IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

v.

THE UNITED STATES,

Respondent.

Supreme Court, U. S.
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF AMICI CURIAE—ASSOCIATION OF RESEARCH LIBRARIES, MEDICAL LIBRARY ASSOCIATION, AMERICAN ASSOCIATION OF LAW LIBRARIES, ASSOCIATION OF AMERICAN UNIVERSITIES, AMERICAN MEDICAL ASSOCIATION, AMERICAN DENTAL ASSOCIATION, AMERICAN ASSOCIATION OF DENTAL SCHOOLS, ROBERT H. EBERT, M.D. (IN HIS CAPACITY AS DEAN OF THE FACULTY OF MEDICINE, HARVARD MEDICAL SCHOOL), THE UNIVERSITY OF MICHIGAN MEDICAL SCHOOL, AMERICAN SOCIOLOGICAL ASSOCIATION, MODERN LANGUAGE ASSOCIATION OF AMERICA, HISTORY OF SCIENCE SOCIETY

PHILIP B. BROWN
STEPHEN C. LIEBERMAN
COX, LANGFORD & BROWN
21 Dupont Circle, N.W.
Washington, D.C. 20036
Telephone: (202) 785-0200

Counsel for Amici Curiae

Of Counsel:
JOHN P. FURMAN

September 9, 1974

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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This brief is submitted by the Association of Research Libraries, Medical Library Association, American Association of Law Libraries, Association of American

Universities, American Medical Association, American Dental Association, American Association of Dental Schools, Robert H. Ebert, M.D. (in his capacity as Dean of the Faculty of Medicine, Harvard Medical School), University of Michigan Medical School, American Sociological Association, Modern Language Association of America, and the History of Science Society. The consent of Petitioner and Respondent to the filing of this brief has been obtained.

INTEREST OF AMICI

The amici who join in this brief represent a broad cross-section of research and specialty libraries and their users who are deeply involved in scholarship, research and the dissemination of scientific knowledge.

For generations, and without any legal challenge, such libraries have made freely available to their users for personal use copies of copyrighted materials in their collections, including articles in issues of medical journals such as those involved in this case. Indeed, such practices were expressly approved by representatives of the publishing world in a "Gentlemen's Agreement" in the 1930's. (Finding 41(a), C. App. 95-97.)[1]

The unhampered continuation of these practices is essential to the free flow of ideas and to the welfare of

[1] References herein to the Appendix to the Petitioner's Brief are denominated "App."; references to the Appendix to the Petition for Certiorari are denominated "C. App."; and references to the trial transcript are denominated "Tr.".

scholarship and research in the United States and throughout the world. These amici submit that these practices are entirely lawful and that the Supreme Court of the United States should affirm the decision of the U.S. Court of Claims to that effect.

The amici are intimately familiar with present and historical practices concerning the exchange of information among scholars and researchers. The Association of Research Libraries is a nonprofit educational association comprising the largest and most comprehensive research libraries in North America. The Medical Library Association is a professional organization, membership in which is open to medical libraries and those working in or interested in medical libraries. The American Association of Law Libraries is a nonprofit professional organization made up of individuals and institutions interested in increasing the usefulness of law libraries, cultivating the science of law librarianship and fostering a spirit of cooperation among members of the profession.

The American Medical Association (AMA) represents approximately sixty percent of the nation's physicians. The Association permits the scientific community to reproduce single copies of articles from the Association's copyrighted publications for individual use, and the AMA has not found any impairment of its copyright protection from observance of this policy. The American Dental Association represents approximately eighty-five percent of the dentists in the United States. The American Association of Dental Schools is composed of the principal institutions of education and research in the field of dentistry.

Harvard Medical School (represented by its Dean, Dr. Ebert) operates and maintains the Francis A. Countway Library of Medicine. The Countway Library combines the Boston Medical Library and Harvard Medical Library and serves the Harvard Medical School, its twenty-two teaching hospitals, and the Boston medical community at large. The Countway is the preeminent bio-medical research library in the New England region and, as the regional medical library, is supported as such by the Federal government under the Medical Library Assistance Act of 1965, 42 U.S.C. §280(b).[2] The Countway currently subscribes to over 5,000 journals, including those published by The Williams & Wilkins Company. The University of Michigan Medical School is one of the nation's leading public medical schools and operates a substantial medical library.

The Association of American Universities is an association of many of the preeminent institutions of higher education in this country. The American Sociological Society, the Modern Language Association of America and the History of Science Society are professional societies dedicated to fostering knowledge and advancing the professional interests of their members in their respective disciplines.

A large part of the copyrighted material with which the researchers, educators and academicians who are members of professional associations are concerned is the product of the scholarly activities of their own members. The purpose of these members in publishing the results of their research and scholarship is to effect a wide dissemination of those results in the scholarly

[2] Act of Oct. 22, 1965, §2, 79 Stat. 1059.

world. They seldom anticipate any significant remuneration in connection with these publications. Rather, they are pleased when other scholars seek copies of their works. They have long assumed that the copying done by other scholars for their scholarly and educational activities is permissible under the "fair use" doctrine and other provisions of the copyright law. For example, the Modern Language Association of America publishes a substantial journal and other occasional publications on which copyright protection has been secured since 1965 without any intention or attempt by the Association to limit the type of copying by a library for its users that is at issue in this case.

QUESTION PRESENTED

The question presented, simply put, is whether, in the particular instances of photocopying on which Petitioner based this suit, copyright is infringed when a library makes a copy of an article in a medical journal in response to the request for such a copy by a reader for his personal use and not for reproduction or distribution.

The Petitioner, however, has formulated the question presented by this case as being whether "systematic reproduction" of copyrighted journal articles constitutes "fair use" or copyright infringement. The Court should note that "systematic reproduction" is a new term which was not employed by the Petitioner in presenting its case in the Court of Claims nor used by that Court in its decision. As Petitioner explains (Pet. Br. 38, n.

27), the Senate Judiciary Committee has reported out a copyright revision bill which, in recognizing a "limited library exemption as to single copies of journal articles," would provide that such an exemption would be inapplicable in the case of "systematic reproduction or distribution." Petitioner thus appears to be trying to foreclose the issue in this case by characterizing the single-copying here involved as a type of systematic reproduction which would not be allowed if the pending bill were enacted in its present form.

It is conceded that the National Library of Medicine (NLM) and the library at the National Institutes of Health (NIH) have developed efficient systems for responding to requests for copies of articles in publications in their collections. But the issue in this case is not whether the libraries perform this service in a "systematic" or in an unsystematic manner, but whether the single-copy service they render constitutes infringement under the 1909 Copyright Act.

COUNTERSTATEMENT OF THE CASE

This case is the first case known to these amici in which claim of copyright has been advanced to challenge "single-copy" photocopying for personal use. The Petitioner, a publisher of medical journals, is asking this Court "to direct an award of reasonable compensation to be paid by the Government for its use of Petitioner's property." (Pet. Br. 49.) In so doing, the Petitioner seeks reversal of the Court of Claims' decision which upheld, as a justifiable and legally supportable exception from copyright, the longstanding

practice of libraries to make or permit the making of a single copy of a journal article for the personal use of the requester. To grant the Petitioner the relief desired would extend the copyright law to practices not heretofore covered, solely for commercial reasons and at an incalculable cost to the promotion of science and the useful arts.[3]

For its claim of right Petitioner relies on Section 1(a) of the Copyright Act.[4] However, because the alleged infringers are Government libraries, Petitioner must rely for its remedy, not on the infringement provision of the Copyright Act, but on 28 U.S.C. §1498(b),[5] in which Congress in 1960 established an exclusive remedy for copyright infringement by Government agencies and contractors. In a suit for infringement under Section 101 of the Copyright Act a plaintiff is entitled to both an injunction and damages which, by the terms of Section 101(b), shall not exceed $5,000 nor be less than $250 for each infringement.[6] Under 28 U.S.C. §1498(b), on the other hand, no injunction is available, and the copyright proprietor's remedy for infringement is "the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 101(b) of title 17, United States Code. . . ." Petitioner's brief emphasizes that no injunction could issue in this

[3] *See* U.S. CONST. art. I, §8.

[4] 17 U.S.C. §1(a), Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

[5] Act of Sept. 8, 1960, 74 Stat. 855.

[6] Act of July 30, 1947, ch. 391, 61 Stat. 661; Act of June 25, 1948, ch. 646, §39, 62 Stat. 992.

case. But a decision in favor of Petitioner could constitute a precedent for possible future cases in which an injunction could issue – to the serious detriment of scholarship and research.

The action in this case was based on thirteen instances of alleged infringement, on various dates in 1967 and 1968, of copyright in eight articles which appeared between 1957 and 1965 in an issue of one or another of four medical journals published by the Petitioner. (Finding 4, C. App. 71-72; Finding 6(b), C. App. 75.) In twelve instances a Government physician or other professional person employed by the National Institutes of Health requested and received from the NIH library a photocopy for his professional use of one of the eight articles in question. (Finding 6(b), C. App. 76.) In the remaining instance, which occurred in January 1968, a doctor assigned to an Army hospital in Japan requested and received from the National Library of Medicine, through its "inter-library loan" procedures, a copy of an article which had been published more than nine years earlier, also for his professional use. (*Id.*)

Amici who addressed the Court below, representing both governmental and non-governmental libraries and library users, supported the Government's position that in none of the thirteen instances was the copying of the article an infringement of copyright. The libraries argued, in particular, that it is and has been an established and recognized practice for a user of a library collection to be permitted to make a single copy for personal use of copyrighted material in the collection or, in the alternative, for the library itself to make such a single copy for the user at the user's

request.[7] A majority of the Court concluded that the plaintiff was not entitled to recover.

Before the Court of Claims the attorney for the plaintiff contended that the making of a single copy of an entire article in a medical journal can never be lawful. Before this Court he states that: "Petitioner would not have sued for the making of a truly single copy." (Pet. Br. 41.) He does not, however, explicitly concede the lawfulness of the "single-copy" practice.

To understand the relevance of this "single-copy" practice it is important to understand precisely the acts of infringement for which the Petitioner brought suit. One act involved the National Library of Medicine (NLM). The remainder involved the library of the National Institutes of Health (NIH). Since it is the NLM to which Petitioner and the amicus briefs supporting the Petitioner direct their primary attention, we will refer first to the single instance of copying of a medical journal article by the NLM.

National Library of Medicine

On January 11, 1968 NLM made a photocopy, at the request of Dr. James L. Pitcher (Finding 6(b), C. App. 75), of an article written by Dr. R.G.F. Parker on *Occlusion of the Hepatic Veins in Man* which had been published nearly ten years earlier in the December 1959 issue of MEDICINE. (Finding 4, C. App. 72.) At the time, Dr. Pitcher was stationed in Japan, and the request for a copy of the article was made through an

[7] *See, generally,* Brief for the Association of Research Libraries, *et al.* as amici curiae to the Court of Claims.

Army hospital library in that country. (*See* Finding 6, C. App. 76.) It was NLM's stated policy not to fill requests for copies of articles from an issue of any of 104 medical journals on a "widely-available list" (which included all four of the journals involved in this suit) unless the issue of the journal was more than five years old (Finding 22(b), C. App. 85), but this restriction did not apply in this case.[8] A copy was made and forwarded to Dr. Pitcher in Japan for his use which involved patient care.

The complaint alleged no other instance in which NLM made a copy of any article for any purpose. We do not suggest that no other copies of this article or other articles were made by NLM for other doctors on other occasions. It is simply that the particular circumstances of other instances of copying by NLM were not established in the Court below. On the other hand, the Court found that requests for more than one copy of a journal article are rejected by NLM, without exception. (*See* Finding 22(c), C. App. 85.)

National Institutes of Health

In the case of NIH, the complaint charged twelve incidents of copying involving eight articles in five issues of four medical journals published between June 1957 and November 1965. (Finding 4, C. App. 71-72; Finding 6(b), C. App. 75.) The copying occurred

[8]In addition, it appears that requests from *Government* libraries are not rejected on the basis of the "widely-available list." See the last sentence of Finding 22(b), C. App. 85.

between September 1967 and December 1968. (Finding 6(b), C. App. 75.)

The NIH library subscribes to two copies of each of the four journals. (Finding 14, C. App. 79.) O copy is retained in the library for the use of readers and one copy circulates. (Finding 17(a), C. App. 80.)

At the request of interested personnel the NIH library will make a photocopy of an article in a medical journal in its collection, subject to certain general rules, among them a provision that only a single copy of a journal article will be made per request and then that each request is normally limited to about forty to fifty pages. (Finding 17(a), C. App. 80-81.) In each of the twelve instances of copying the requester was a physician or other professional employee who requested the article in connection with medical research work or patient care. (Finding 6(b), C. App. 76.) Trial testimony by Dr. Benjamin M. Banks, the author of one of the articles in question, indicated that he personally subscribed to six professional journals. (Tr. 900.) Testimony of Dr. J.L. Starr, the author of another one of the articles, indicated that he subscribed to most of the journals of interest to him, but that economic considerations prevented him from purchasing journals in which he was only interested in a single article. (Tr. 715-16.)

SUMMARY OF ARGUMENT

The constitutional purpose of copyright protection is "To promote the Progress of Science and the useful

Arts".[9] Affirmance of the decision below would serve this purpose.

Congress did not intend, by the choice of words used in defining the "exclusive rights" of authors in Section 1(a) of the Copyright Act of 1909,[10] to prohibit a library from performing one of the most basic library functions – making published material in its collection available to an individual reader for the reader's own use, whether by lending the material itself or by means of a photocopy made by the reader or at the reader's request. The "single-copy" practice of libraries is a reasonable and customary use of material in a library's collection which is not an infringement of copyright. Such use falls within the "fair use" exception to copyright and is clearly distinguishable from copying for purposes of republication and commercial exploitation.

The Petitioner and the amici which support its position are seeking additional compensation for normal library uses of copyrighted material after the library has purchased the material from the publisher. Such additional compensation is not authorized by law and would extend copyright beyond its proper bounds. Moreover, the Petitioner has not established that it has been authorized by the authors of the medical journal articles to bring suits for infringement on the basis of the particular uses alleged in Petitioner's complaint.

[9] U.S. CONST. art. I, §8.

[10] 17 U.S.C. §1(a).

ARGUMENT

I.

PRELIMINARY STATEMENT

Article I, Section 8 of the Constitution empowers Congress to grant to authors exclusive rights in their writings, for a limited time, in order to "Promote the progress of Science and useful Arts. . . ." A review of copyright legislation going back to the original Copyright Act of 1790[11] makes clear the "exclusive right" granted to authors pursuant to Article I, Section 8 does not prohibit an individual from copying from the author's work for personal use. A library's normal use of materials in its collection, including single-copy photocopying for personal use, similarly does not invade the exclusive right granted by the copyright laws and is a reasonable and customary use of materials in the library's collection.

Once an author has secured copyright protection by the general publication of his work, the Copyright Act confers on him for a limited time certain rights to prevent others from making public uses of that work. He can prevent the publication and distribution of a new edition of his work and he can prevent excessive use of material from his work in a work published by another.

This case is not concerned with such public uses of copyrighted materials. It is concerned, rather, with the use for scholarly and professional purposes of copy-

[11] Act of May 31, 1790, ch. 15, 1 Stat. 124.

righted material in a library's collection under circumstances in which no new publication, new edition, sale, or other public use of the material occurs. The failure of the Petitioner to make this distinction invalidates much of his reasoning.

A library exists to permit its patrons to use its books and periodicals, whether copyrighted or not. When a patron reads a copyrighted article in a periodical, he is making exactly the personal use of that article which was intended by the author in writing it, the publisher in printing it, and the library in subscribing to the journal which contains it. The reader can show it to a fellow reader, or discuss it with other readers, or memorize it. It has also always been understood that he can copy it for his private use as a reader, student, scholar, or researcher without in any way infringing the author's copyright. Such use fulfills one of the principal functions of a library and it does not constitute publication because it is neither a publishing activity nor any other form of public use prohibited by the statute. Just as a scholar or other reader has always been considered to have a right to make a single copy of copyrighted material for his own personal use, he also has the right to request that a library make the copy for him. The library may prefer to make a copy if only to be certain that the original is not damaged in the copying process. Libraries have followed the practice for many years of providing such copies; such a copy serves as a substitute for lending the copyrighted material itself.

In the present case the users of copyrighted material were professional persons requiring the material for use in medical research work or patient care at the National

Institutes of Health or, in one instance, at an Army hospital in Japan. The right to make a single copy for personal use is important, however, to a wide variety of scholars and other library users, such as a high school senior who wishes a copy of an article in the back issue of a magazine for use in a debate, a professor selecting material for use in preparing lectures or in writing a book who cannot organize and file the material except as written notes or in photocopy form, or a private physician who, in caring for a patient, needs immediate access to an article which appeared at one time in a medical journal.

Since the right to make (or have made) a single copy of a copyrighted material for the personal use of a scholar or other reader has never previously been challenged, the courts have not had the occasion to address themselves to the legal basis for this right. The amici here suggest that both the history of U.S. copyright legislation and the concept of "fair use" show that the provisions of copyright law and the needs of scholars are compatible. We also suggest, however, that there are more limited grounds on which the present case can be decided without reaching the broader questions with which we are principally concerned. For example, the Petitioner has not proved that it is the owner of the copyrighted works which it alleges have been infringed or, more narrowly, that any rights it has derived from the authors of these works include a right to prevent the copying here at issue.

The Petitioner's concern that new technology will supplant traditional journal subscriptions (Pet. Br. 40-41) is unsupported by evidence of record and is not

relevant to the case before the Court. The ability of libraries to perform their traditional services, however, is at issue. Consider the photocopying for which the Petitioner seeks compensation. The article which is the subject of Count I was published in MEDICINE in November 1965 (Finding 4, C. App. 72), and the requests for copies were made in September and October 1967 (Finding 6(b), C. App. 75.) It can hardly be suggested that, if the physicians involved in this count had a need to subscribe to MEDICINE on a current basis to keep up with progress in their professional field, this need would be met by requesting a copy of an article nearly two years old. In every other count in the complaint the article requested was *more than* two years old. (Finding 4, C. App. 72; Finding 6(b), C. App. 75.) The same publication is also involved in Count VIII. In that case one of the requesters was a doctor assigned to an Army hospital in Japan who in January 1968 needed to refer to an article on *Occlusion of the Hepatic Veins in Man* which appeared in MEDICINE in December 1959. (*Id.*) It can hardly be suggested that, but for the photocopying service provided by the National Library of Medicine, the doctor in question would not only have to have been a subscriber to MEDICINE since 1959, but would also have to have carried his private collection of back issues of MEDICINE around the world with him, not to mention all the other medical journals to which he might have to refer in the future.

The case before this Court concerns only instances of copying articles in back issues of medical journals, the copying having been carried out in accordance with

restrictive rules on photocopying established by NIH (Findings 16-18, C. App. 80-81) and NLM (Findings 22-24, C. App. 84-88.) No infringement of copyright has occurred. First, such copying is essential to effective medical research, and the clause of the Constitution which deals with copyright authorizes only such protection of authors as will "promote the Progress of Science and useful Arts". Nor would reversal of the Court of Claims decision be justified by the terms of the Copyright Act itself because the reference in Section 1 of that Act to an "exclusive right" to "copy" was never intended to preclude the copying covered by the present complaint. This has been the clear understanding of the law since it was enacted, and not until this case was filed has any publisher or other copyright holder challenged the well-known practice of libraries in making single copies of materials for readers as a means of providing ordinary and necessary access to the libraries' collections. Even if this single-copy practice were to be viewed as a technical violation of copyright under the 1909 Act, this would not justify a holding for the plaintiff because the copying charged in the complaint would be within the scope of the recognized defense of "fair use".

A holding for the Petitioner here would be particularly unjustified because, from that point of view of the original authors of the articles in question, the publisher's effort to control the copying of articles in back issues of medical journals is wholly contrary to established practices and to the authors' own intense interest in the circulation of knowledge and the promotion of science. (*See, e.g.*, Finding 10, C. App.

77-78.) Reversal of the Court of Claims decision would seriously interfere with well-established procedures of scholarship and research without any significant benefit to the Petitioner for whom the sale of copies of journal articles has never been a substantial source of income (Findings 38, 39, C. App. 93-94) and with great detriment to both the authors of the material in question and to the users of the material and the public.

II.

THE CONSTITUTIONAL POLICY UNDERLYING THE LIMITED EXCLUSIVE RIGHTS GRANTED TO AUTHORS AND INVENTORS REQUIRES THE RESULT REACHED BY THE COURT OF CLAIMS

The result reached by the Court of Claims is required by the Constitutional policy expressed in the clause by which Congress is empowered "To promote the Progress of Science and useful Arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries".[12] As Congress recognized at the time it enacted the present Copyright Act in 1909,[13] any copyright law must be framed and must be interpreted in the light of the Constitutional purpose:

> "The object of all [copyright] legislation must be (1) to promote science and the useful arts; (2) by securing for limited times to authors the exclusive right to their writings; (3) that the subjects which are to be secured are 'the writings of authors.' It will be seen, therefore, that the spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress."[14]

[12]Art. I, §8.

[13]17 U.S.C. §1, *et seq.*

The Petitioner asserts that, once an article has been published in one of its medical journals, it has the right to control the copying of the article in any form and for any purpose. Recognition of such a right would not promote the progress of science and useful arts. It would also not promote the interests of the authors of the articles. As one of them testified during the trial in this case, "Research without communication is useless," not only in terms of making one's own results available but also in terms of "consulting the prior literature".[15]

The authors in this case received no monetary compensation for their articles. (Finding 10, C. App. 77.) In addition to the objective of receiving recognition from the scientific community for their profes-

[14]H.R. REP. NO. 2222, 60th Cong., 2d Sess. 6-7 (1909). The Senate Committee adopted the House report. S. REP. NO. 1108, 60th Cong., 2d Sess. 1 (1909).

[15]Testimony of Dr. V.A. McKusick. (Tr. 666.) Dr. McKusick was one of the authors of an article on *The Genetic Mucopolysaccharidoses* which was published by Petitioner in the November 1965 issue of MEDICINE and photocopied by the NIH library in September and October 1967. (Finding 4, C. App. 72; Finding 6(b), C. App. 75.)

sional work, the purpose of publication was "to disseminate medical information for the public welfare". (*Id.*) To facilitate such dissemination authors of articles in medical journals themselves obtain reprints at the time of original publication for distribution, usually free of charge, to interested colleagues and others who may request copies. (Finding 11, C. App. 78.) To argue, as in the Petitioner's brief,[16] that the type of photocopying which is at issue in this case "will have the undesired result of discouraging creative efforts of authors. . ." (Pet. Br. 15) is to obscure completely the character of these authors and the nature of their interests. When the needs of these authors and the readers they are trying to reach and inform are put in proper focus, one must conclude, with the Court of Claims, that: "There is no doubt in our minds that medical science would be seriously hurt if such library photocopying were stopped."[17]

The argument is advanced, however, that "this lawsuit became necessary to prevent the destruction of Petitioner's copyrights and of its business. . ." (Pet. Br. 17). One need not debate whether the manner of dissemination of scientific information represented by Petitioner's journals is the only or the best method

[16]*See also* Brief for the Authors League of America, Inc. as amicus curiae 2: "This ruling [of the Court of Claims] could diminish or destroy the author's income from the medium which first disseminates his work . . . ." The Authors League is a national society of professional writers and dramatists.

[17]Williams & Wilkins Co. v. U.S., 487 F.2d 1345, 1356 (Ct. Cl. 1973); C. App. 19.

which is available to accomplish the desired result. The fact is that, on the basis of the record in the present case, it is impossible to conclude that the single-copy photocopying practices of libraries has endangered the continuation of such publications. As the Trial Judge put it, "There is no evidence to show whether any particular instance or instances of unauthorized photocopying of plaintiff's journals resulted in the loss of a particular form of revenue to plaintiff".[18] The majority of the Court was prepared to go further and concluded, more generally, that the "record simply does not show a serious adverse impact, either on plaintiff or on medical publishers generally, from the photocopying practices of the type of NIH and NLM".[19]

The Petitioner may be right that, in order to qualify for minimum statutory damages of $250 for each alleged infringement, "it was neither necessary nor appropriate for Petitioner to seek to establish damages in the traditional sense". (Pet. Br. 31.) But where the issue is whether single-copy photocopying of libraries serves "To promote the Progress of Science and useful Arts" or impedes such progress, the absence of a showing of damage to the copyright proprietor takes on an overriding significance.

[18]Finding 39(b), second paragraph, App. 79. The Court retained this finding as the first sentence of its Finding 39(d), C. App. 94.

[19]487 F.2d at 1359; C. App. 23.

III.

THE STATUTORY PROVISIONS GOVERNING COPYRIGHT DO NOT AUTHORIZE AN AWARD OF COMPENSATION IN THIS CASE

The plaintiff in a copyright case must establish (1) that there has been an invasion of an "exclusive right" granted by Section 1 of the Copyright Act[20] and (2) that there has been an infringement for which a court should award damages. In the present case, the Court of Claims held that the defendant was "free of liability in the particular situation presented by this record".[21] In our view, that holding is correct, not only because a library does not invade any "exclusive right" created by Section 1 of the Copyright Act when, at the request of a reader, it makes a single copy of an article in a periodical, but also because such a single-copy practice is a reasonable and a customary use of material in a library's collection for which no damages should be awarded. In particular, the library does not invade any

[20]Section 1 of the Copyright Act, 17 U.S.C. §1, provides in applicable part:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: (a) to print, reprint, publish, copy, and vend the copyrighted work."

[21]487 F.2d at 1347; C. App. 3. In the usual case, the copyright proprietor is relying on Section 101 of the Copyright Act, 17 U.S.C. §101, which also provides for additional remedies, including an injunction. In the present case, the assertion of a right to "an award of reasonable compensation" is not based on Section 101, but, instead, on 28 U.S.C. §1498(b).

"exclusive right" to "copy". This conclusion is supported (1) by the history of §1(a) of the Copyright Act of 1909 which suggests that the exclusive right to copy, as applied to books or journals, has reference only to copying in connection with "printing, reprinting, publishing and vending" the work; (2) the practices of the Library of Congress with respect to copying both before and after the enactment of the 1909 Act; and (3) the long-recognized exceptions to the "exclusive right" to copy where limited copying, for a variety of reasons, is considered justifiable.

A. A library does not invade any "exclusive right" created by Section 1 of the Copyright Act when, at the request of a reader, it makes a single copy of an article in a periodical.

1. Prior to the Copyright Act of 1909 mere copying of material in a book, without more, did not constitute an infringement of copyright.

As applied to books and periodicals the language in Section 1(a) of the present law is in a direct line of descent from Section 1 of the original Copyright Act of 1790.[22] That provision did not give an author of a

[22]Act of May 31, 1790. In the terminology of the seventeenth and eighteenth centuries, when copyright was evolving, the term "copy right" was used to refer to the privilege of printing and publishing an edition of a work and selling the copies so produced. *See* PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 4 (1968). (The word "copy" was also used, as a noun, to refer to the written manuscript from which the printer set up type.) In North America in the pre-Constitutional period, when the Continental Congress recommended that the several

book an exclusive right to copy his work. The First Congress merely provided that "the author and authors of any map, chart, book or books . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books. . . ."[23] The section defining the "sole liberty" of the author was supplemented by a *separate* section which dealt with infringement,[24] but nothing in that section provided any protection against copying which did not

States adopt laws to secure to authors of new books the copyright of such books, the word "copy" was treated as synonymous with the "exclusive right of printing, publishing and vending":

> *"Resolved*, That it be recommended to the several States, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators and assigns, the copy right of such books for a certain time not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copy right of such books another term of time not less than fourteen years, ***such copy or exclusive right of printing, publishing and vending*** the same, to be secured to the original authors, or publishers, their executors, administrators and assigns, by such laws and under such restrictions as to the several States may seem proper."

LIBRARY OF CONGRESS COPYRIGHT OFFICE, COPYRIGHT ENACTMENTS 1 (1963). (Emphasis supplied.)

Bowker makes the same point in the first sentence of his treatise on COPYRIGHT: ITS HISTORY AND ITS LAW (1912) when he says, at page 1: "COPYRIGHT (from the Latin *copia*, plenty) means, in general, the right to copy, to make plenty. . . ."

[23] *Id.* §1.

[24] *Id.* §2.

involve printing, reprinting, publishing, or importing. It is clear that what the Congress had in mind was a "sole right" of the author (or his assignee) to publish and sell a printed edition of his work, including any reprinted edition.

When the copyright law was generally revised in 1831,[25] Congress continued to speak in terms of "the sole liberty of printing, reprinting, publishing and vending" books (and certain other works).[26] The infringement section relating to books used terminology which was similarly limited.[27] However, in the *separate* infringement section relating to prints, cuts, engravings, maps, charts, and musical compositions, Congress found it necessary to employ more complicated language to describe the normal process of producing copies of such works for public distribution and use. In this limited context Congress found it convenient to provide that, if any person shall "engrave, etch, or work, sell, or copy" such a work without consent, the offender would be subject to certain penalties.[28] However, although a reference to "copy" was thus introduced into the infringement provision applicable to prints, cuts, etc., parallel language was not used in the infringement section relating to books.

In 1870 the copyright law was again revised. As in the earlier law, *one* section was used to describe the author's "sole liberty"[29] and *later* sections dealt with

[25] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

[26] *Id.* §1, 4 Stat. at 436.

[27] *Id.* §6, 4 Stat. at 437-38.

[28] *Id.* §7, 4 Stat. at 438.

[29] Act of July 8, 1870, ch. 230, §86, 16 Stat. 212.

the subject of infringement. The section dealing with the author's "sole liberty" was used to cover all types of works, and became quite complicated because it was expanded to cover a wide variety of such works – including engravings, cuts, statues, and models.[30] In this context the statement of the right of the author of a book – which had always been in terms of "printing, reprinting, publishing, and vending" – was combined with words more suitable to other media (including the word "copy"). Congress made it clear, however, that it did not intend these other words to apply to books by the way in which it framed the infringement sections of the law. The infringement section applicable to works *other than books* provided a remedy against any person who shall "engrave, etch, work, copy, print, publish, or import. . . ."[31] The infringement section applicable to *books*, on the other hand, provided a remedy only against a person who shall "print, publish, or import . . . ."[32] No remedy was provided against one who might "copy" a book.

[30]The section of the Act of 1870 read as follows:

"SEC. 86. *And be it further enacted*, That any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, or of models or designs intended to be perfected as works of the fine arts, and his executors, administrators, or assigns, shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same . . . ."

[31]Act of July 8, 1870, ch. 230, §100, 16 Stat. at 214.

[32]*Id.* §99.

In 1873, the infringement section on books became Section 4964 of the Revised Statutes and the infringement Section dealing with other works became section 4965.[33] Between 1873 and 1909, the copyright laws were amended a number of times,[34] but no change was made in this pattern. It continued not to be an infringement of copyright to "copy" a book, in the absence of printing, publishing, or vending.[35] The "sole liberty" section of the law continued to be used to

[33]Act of December 1, 1873, Title 60 ("Patents, Trade-Marks, and Copyrights"), ch. 3, R.S. §§4964 and 4965, 18 Stat. 967-68. The "sole liberty" section became R.S. §4952, 18 Stat. 966.

[34]Act of March 3, 1891, ch. 565, 26 Stat. 1106; Act of March 2, 1895, ch. 194, 28 Stat. 965; Act of January 6, 1897, ch. 4, 29 Stat. 481; Act of January 7, 1904, ch. 2, 33 Stat. 4; and Act of March 3, 1905, ch. 1432, 33 Stat. 1000.

[35]This distinction was recognized and applied in Harper v. Shoppell, 26 Fed. 519 (C.C.S.D.N.Y. 1886). The defendant had acquired a copy of a cut used to print an illustration in *Harper's Weekly;* he made an electrotype plate from the cut and sold it to the *New York Illustrated Times* which then published the illustration. *Harper's* sued the maker of the cut, but, because they had not copyrighted the cut, the suit was brought for infringement of their publication. The court assumed the copyright on the publication covered all its contents, but held that copyright was not infringed because, although under Section 4965 of the Revised Statutes "copying" a cut would be an infringement (if the cut were copyrighted), Section 4964 provided no remedy against "copying" a book, the defendant not having engaged in printing or publishing the illustration. *Harper's* later moved for a new trial and secured a judgment on the theory that the defendant was liable for the printing and publishing of the illustration by *New York Illustrated Times* as a joint tort-feasor. Harper v. Shoppell, 28 Fed. 613 (C.C.S.D.N.Y. 1886).

cover all types of works and therefore continued to include a reference to "copying" to cover such works as paintings and statuary, but since no remedy was provided for infringement by the "copying" of a book, it continued to be clear that the "sole liberty" of the author of a book was intended to be limited, as it had always been, to "printing, reprinting, publishing, . . . and vending".[36]

2. Congress did not change this rule in 1909.

The history of the Copyright Act of 1909 demonstrates that the particular phraseology used in Section 1(a) was not intended to change the substance of the law on the protection of authors of books as it had existed since 1790.

The first point to be noted is that Congress continued to use the first section of the Act to describe the rights of authors, in general terms, while providing remedies for infringement of such rights in later provisions. Before 1909, as we have seen, "the sole right and liberty of printing, reprinting, publishing and vending" in the 1790 Act had been elaborated in order to encompass a variety of works other than books. Section 4952 of the Revised Statutes of 1873, for example, spoke of protecting "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending. . .; and, in the case of

[36]For a decision holding that Section 4962 of the Revised Statutes, which consolidated earlier language, need not be applied in the same way to all types of works, *see* American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907).

a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others." This "sole liberty" belonged, as the case might be, to "the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts. . . ."[37]

Such language was hopelessly complex and, in 1904, in passing an act to give special protection to exhibitors of foreign works at the Louisiana Purchase Exposition, Congress referred instead to "the sole liberty of printing, reprinting, publishing, copying, and vending."[38] In this way the general term "copying" was introduced into the law as a substitute for the more cumbersome "completing, copying, executing, finishing" phraseology which had previously been used to provide coverage for such works as chromos, statutes, statuary, and other examples of the fine arts. It continued to be clear, however, that "copying" was *not* considered to relate to books. In 1905, when Congress added to the copyright law a new paragraph to provide a procedure for securing copyright protection for books in a foreign language first published outside the United States, the only exclusive rights referred to were "the sole liberty of printing, reprinting, publishing, vending, translating and dramatizing the said book. . . ."[39] Thus "copying"

[37]Act of Dec. 1, 1873, ch. 3, 18 Stat. 966.

[38]Act of Jan. 7, 1904, ch. 2, 33 Stat. 4.

[39]Act of March 3, 1905, ch. 1432, 33 Stat. 1000, *amending* R.S. §4952.

had been introduced into the law in 1904 as a useful generic term, but Congress in 1905 had made clear again that it did not recognize any exclusive right to "copy" a book.

In the 1909 Act the same drafting device was used: the traditional reference to an exclusive right to print, reprint, publish, and vend was used to cover the works (including books) for which such words were appropriate, and a reference to "copy" was included to cover other types of works where printing and reprinting is not involved. The final report of the House Patent Committee on the bill which became the 1909 Act went out of its way to make clear that, in this respect at least, the copyright law was not being changed:

> "Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word 'copy', practically adopts the phraseology of the first copyright act Congress ever passed – that of 1790. Many amendments of this were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts."[40]

That the Congress had no intention or desire to limit the copying practices of libraries by its choice of words in Section 1(a) is evident from a detailed examination of the legislative history of the Copyright Act of 1909 from its first consideration in the 59th Congress in 1906 until its enactment on the last day of the Second Session of the 60th Congress in March 1909.

[40]H.R. REP. NO. 2222, 60th Cong., 2d Sess. 4 (1909). The Senate Committee adopted the House Committee report. S. REP. NO. 1108, 60th Cong., 2d Sess. (1909).

The principal hearings on the revision of the copyright laws were held during the First Session of the 59th Congress in June and December 1906, before a joint committee of the House and Senate Committees on Patents. The bills before this joint committee (H.R. 19853 and S.6330) utilized the text of a bill drafted by the Register of Copyrights on the basis of conferences called in 1905 and 1906 by the Librarian of Congress, Dr. Herbert Putnam, following a Presidential message in December 1905 which urged that the copyright laws be revised.[41] The bill, which we will refer to as "H.R. 19853", was presented by Dr. Putnam at the opening of the public hearings in June 1906 as a bill "resulting from" the work of the conferences (although not a "conference bill" to which the participants in the conferences were committed). Throughout the consideration of the bill Dr. Putnam served as its leading proponent before the congressional committees.

As in the case of the bill which was ultimately enacted in 1909, the statement of the nature and extent of copyright was presented in the first section of H.R. 19853. The subsections of this Section 1 which applied to books (including periodicals) read as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the copyright secured by this Act shall include the sole and exclusive right:
>
> (a) For the purposes set forth in subsection (b) hereof, to make any copy of any work or part thereof the subject of copyright under the provisions of this Act, or to abridge, adapt, or

[41]*See* GOLDMAN, THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION 1901-1954, 1-2 (1955).

translate into another language or dialect any such work, or make any such version thereof;

(b) To sell, distribute, exhibit, or let for hire, or offer or keep for sale, distribution, exhibition, or hire, any copy of any such work; . . . ."[42]

This formulation stated the "exclusive right" of a copyright proprietor *not* in terms of the making of "any copy" of a work, but *only* in terms of the making of copies *for the purposes set forth in subsection (b)* – that is, for the purposes of sale, distribution or other commercial exploitation. Thus, it was announced at the outset that the object of granting copyright for books would remain the same as it had always been – to establish and protect the exclusive right to print, publish, and sell the copyrighted work. There is no evidence in the legislative history that this objective was ever altered as the bill made its way through the legislative process.

That Congress had no intention of impairing the rights of libraries to make use of the materials in their collections – but, on the contrary, wished to avoid any interference with those rights – is illustrated by the disposition made of an objection the libraries themselves offered to the original formulation of Section 1 of H.R. 19853 as we have quoted it above. That objection concerned Section 1(b) which dealt with many more types of works than just books and, as in the case of certain earlier provisions of copyright law, included words having no application to books. Section

[42]LIBRARY OF CONGRESS, THE COPYRIGHT BILL: S. 6330, H.R. 19853, 59TH CONG., 1ST SESS., 9 (Copyright Office Bulletin No. 12 (1906)).

1(b) referred to an exclusive right "To sell, distribute, exhibit, or let for hire, or offer or keep for sale, distribution, exhibition, or hire any copy of such work." The libraries objected that this might interfere with their normal services (such as the circulation of books in their collections), and the House Committee on Patents deleted Section 1(b) on the basis of this objection. The Committee's Report explains the change:

"It was insisted that this paragraph would prevent the purchaser of a copyrighted book from reselling it or lending it or giving it away or the letting for hire of any such book, thus putting an end to circulating libraries. Your committee believed that this section was susceptible of that construction and that under it a man might have only a qualified title to the copyrighted books in his library. This entire paragraph was eliminated, and in this bill the phraseology of the existing law has been substantially reproduced. . . ."[43]

Thus it is obvious that the congressional intent in drafting the provision which ultimately became Section 1(a) of the Act of 1909 was to protect the recognized rights of libraries to make use of the materials in their collections and in no way to impair those rights. Had the continuing use of the word "copy" in Section 1(a) been intended to effect a substantial change in the law in this respect, the committees of Congress would hardly have failed to make clear this intention and, if this had been the intention, the change would most certainly have been vigorously opposed by the Librarian of Congress, who played such a leading role in the formulation of the 1909 Act.

[43]H.R. REP. NO. 7083, 59th Cong., 2d Sess. 8 (1907). The accompanying bill was numbered at that time H.R. 25133.

3. The copying practices followed by the Library of Congress prior to and following the passage of the 1909 Act support this interpretation.

We have noted above that it was the Librarian of Congress, Dr. Herbert Putnam, who spearheaded the preparation of the Copyright Act of 1909 and was the primary witness in the hearings on that legislation.[44]

In 1908 the Library of Congress published RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS. Those rules included the subject of the lending of books and, in addition, the alternative procedure of responding to requests for material through answers to correspondence. The list of "questions which the Library answers most willingly" included requests "(where of moderate extent) for an extract from a book in its possession."[45] The rules made clear that the restriction based on the "extent" of the request was related to limitations of time and expense and not to any supposed inhibition springing from laws of copyright because the next paragraph read as follows:

[44]This Court recognized the significance of the role played by Dr. Putnam in the adoption of the 1909 Act in Mazer v. Stein, 347 U.S. 201, 213-214 (1954), where the successive copyright laws beginning with 1790, the legislative history of the 1909 Act (including Dr. Putnam's testimony), and subsequent practice in the Copyright Office were relied upon in concluding that the terms "works of art" and "reproductions of works of art" include mass-produced statuettes sold as lamp bases.

[45]LIBRARY OF CONGRESS, RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS 11 (1908).

> "Its ability to make extracts or to undertake research (other than purely bibliographic) is necessarily limited, and its usual course is to refer the inquirer to the sources and recommend to him a person to undertake the search or make the extract at his expense. . . ."[46]

Photocopying was available as a copying technique and was the subject of a separate section in the 1908 rules on the use of books:

> "*Photographing*. Photographing is freely permitted. The permission extends to the building itself and any of its parts, including the mural decorations. *It extends to articles bearing claim of copyright*, but the Library gives no assurance that the photograph may be reproduced or republished or placed on sale. These are matters to be settled with the owner of the copyright." (Emphasis added.)[47]

Thus the Library drew a distinction between (1) the making of a photograph of any copyrighted article, which it permitted, and (2) the further reproduction or republication or sale of the photograph, which were matters to be settled with the copyright owner. The Library did not take a position on the circumstances under which such further reproduction or republication or sale might require the owner's consent, but its rules made clear that it considered a user of the Library free

[46]*Id.* at 11-12.

[47]*Id.* at 6. The policy expressed in this paragraph had been in effect at least since 1901 when it was described, in almost precisely these same words, in a section of the Report of the Librarian of Congress (Herbert Putnam) to the Congress for the fiscal year ending June 30, 1901. *See* REPORT OF THE LIBRARIAN OF CONGRESS 208 (1901).

to make a photograph of any copyrighted article in its collection.

In 1908, when the Library of Congress published RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS, the first section of the copyright bill awaiting final action by the Congress already expressed the "exclusive right" of the owner of a copyrighted work in terms of a "right to print, reprint, publish, copy, and sell" the work. If the Library had considered its 1908 copying practices to be inconsistent with an "exclusive right" to "copy" within the meaning of the pending bill, of which it was the primary proponent, it is unlikely that the 1908 rules relating to copying would have been issued in their original form.

We need not rely on indirect evidence, however, because *after the passage of the 1909 Act* the Library of Congress made clear that it considered its 1908 rules for the use of books to be entirely consistent with the new Act by continuing those same rules in force, through frequent new editions. The next edition of the Library's RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS which is available is dated 1913.[48] The Library continued to offer to make extracts "of moderate extent" from books in its collection or to refer inquirers to persons who might make extracts at the inquirer's expense.[49] The para-

[48]LIBRARY OF CONGRESS, RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS (1913). We have been informed by the Library's staff that there was also a 1911 edition, but no copy of this publication has been located.

[49]*Id.* at 13-14.

graph on "photographing" copyrighted materials was continued unchanged.[50] Thus the government agency which had been most involved in the passage of the Copyright Act of 1909 did not consider that the language of Section 1(a) of that Act referring to an "exclusive right" to "copy" required any change in its copying practices. Indeed, in the 1913 edition of the rules on the use of books, the Library *expanded* its copying services. The section on "Photographing" in the 1913 RULES is immediately followed by one on "Photostat":

> "Photo-duplicates of books, newspapers, maps, etc., can be furnished at a reasonable rate by means of the photostat, installed in the Chief Clerk's Office. Apply to the Chief Clerk for a schedule of charges."[51]

Later editions of the Library's RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS were published in subsequent years, including 1918, 1921, 1929, 1932, and 1939. Throughout this period the copying services offered both prior to the passage of the 1909 Act and subsequent to the passage of the 1909 Act were continued. In 1939, thirty years after the Act was adopted, the Library continued to offer to make extracts from books,[52] to refer inqurers to persons who would make extracts,[53] to permit photographing of "articles bearing claim of copy-

[50]*Id.* at 6.

[51]*Id.*

[52]*Id.* (1939) at 18.

[53]*Id.*

right,"[54] and to provide a photoduplication service.[55]

Dr. Herbert Putnam, the principal official involved in the drafting and passage of the Copyright Act of 1909, continued to serve as Librarian of Congress until 1939. When he was memorialized by the American Council of Learned Societies at the time of his retirement, one of the grounds on which he was extolled was the following:

> "You have led in adapting the most modern photographic processes to the needs of the scholar, and have . . . made widely available for the purposes of research copies of your own collections . . . ."[56]

It would be the height of irony if the Copyright Act of 1909 of which Dr. Putnam was the leading proponent were now held to provide a basis for preventing the effective use of library copying to serve research needs.

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[54] *Id.* at 6.

[55] *Id.* Through the years the description of this service was modified from time to time. The 1921 RULES at 6 read: "Photo-duplicates of certain classes of books, newspapers, manuscripts, maps, etc., in the Library collections, can be furnished, when required for work of a serious literary or scientific character, by means of the photostat, installed in the Chief Clerk's Office. Apply to the Chief Clerk for information as to charges, etc." The 1939 RULES at 6 stated: "The Library of Congress maintains a Photoduplication Service from which copies (on film or paper) of available materials may be obtained at a nominal cost. For information apply to the Chief Clerk."

[56] Address to Herbert Putnam, Librarian of Congress 1899-1939, American Council of Learned Societies (Washington, D.C., Jan. 27, 1939) second page of text.

The Court of Claims correctly refused to reinterpret Section 1(a) of the Copyright Act in a way which would defeat a major objective of one of its most prominent sponsors.

The Petitioner attempts to cast doubt on whether the Library of Congress still endorses the "single-copy" policy of earlier years by suggesting (Pet. Br. 10) that "the policy of the Library of Congress is that 'copyright material will ordinarily not be copied without the signed authorization of the copyright owner.'" As the Court below pointed out, however, the Library maintains photocopying machines for the use of readers and recognizes the right of readers to make a single photocopy of copyrighted material for the purpose of study, scholarship or research.[57]

4. Single-copy photocopying also does not infringe the exclusive right to "print, reprint, publish . . . and vend".

The Petitioner goes further than alleging infringement of an exclusive right to "copy" and argues that "the Government's operation of its photoduplication system amounts to the copying, printing, reprinting and publishing of petitioner's copyrighted journal articles." (Pet. Br. 49.) We deny that the making of a single photocopy by a reader or at the reader's request is "printing", "reprinting" or "publishing" as those terms are used in Section 1(a) of the Copyright Act.[58]

The Petitioner begins by asserting that "The words 'print, reprint, publish and copy' set forth in section

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[57] *See* 487 F.2d at 1355, n. 16. C; App. 17.

[58] 17 U.S.C. § 1(a).

1(a) of the Copyright Law . . . mean what they say." (Pet. Br. 12.) This is a misquotation—and a Freudian slip. The words in Section 1(a) are "print, reprint, publish, copy *and vend*" (emphasis added) and it is entirely clear that, when Congress spoke of an "exclusive right" to "vend the copyrighted work," they *did not* mean what they said. Before 1909 it had been established, by judicial interpretation, that the owner of a copyright has no right to do more than to print and to sell, and having sold he cannot thereafter exercise any control over the particular copies, either as to the use which is to be made of them or the price at which they were to be sold.[59] As the principle is usually expressed, the exclusive right to vend is exhausted by the first sale.[60]

Since Congress did not mean what it said when it referred to an "exclusive right" to "vend" a copy-

[59] *See* Bobbs-Merrill v. Straus, 210 U.S. 339 (1908). *See also* Harrison v. Maynard, Merrill & Co., 61 Fed. 689 (2d Cir. 1894) (resale of books salvaged from fire); Independent News Co. v. Williams, 293 F.2d 510, 515-17 (3d Cir. 1961) (resale of comic books); Ginn & Co. v. Apollo Publishing Co., 215 Fed. 772, 778 (E.D. Pa. 1914); *confirmed and modified*, 228 Fed. 214 (E.D. Pa. 1915) (dictum re acquisition by purchase of a copy of "right to resell it or to preserve and renovate it"). *Compare* National Geographic Soc. v. Classified Geographic, Inc., 27 F. Supp. 655 (D. Mass. 1939) (publication of collection of materials from second-hand magazine issues held infringing "compilation").

[60] *See e.g.*, 17 U.S.C. §27: ". . . nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained." Act of July 30, 1947, ch. 391, §1, 61 Stat. 652 (derived from 17 U.S.C. §41 (1946), Act of Mar. 4, 1909, ch. 320, §41, 35 Stat. 1084, without change).

righted work, it is essential to be cautious in interpreting the intended scope of the other elements of an author's exclusive right.

As we have pointed out earlier in this brief, the "exclusive right" to "print" and "reprint" a copyrighted work and the "exclusive right" to "publish" the work have been provided for in the copyright law since Congress first created a "sole right and liberty of printing, reprinting, publishing and vending . . . ."[61] There can be little doubt that when Congress spoke in 1790 of "printing" and "reprinting," it had the printing press in mind. While the decision of the Court of Claims suggests that "The photocopy process of NIH and NLM . . . does not even amount to printing or reprinting in the strict dictionary sense . . . ",[62] we have no doubt that the production of a *new edition* of a published work by any of several methods (including mimeographing[63] and photocopying) would invade the "exclusive right" created by Section 1(a) of the Copyright Act. Notwithstanding the foregoing, for the purpose of the present case, the point is that, while "printing or reprinting" may include "all mechanical reproduction of a number of copies, they would still

[61] Act of May 31, 1790.

[62] 487 F.2d at 1351, C. App. 10-11.

[63] *See* Macmillan Co. v. King, 223 Fed. 862, 867 (D. Mass. 1914) holding typewriting or mimeographing to be "printing" within the meaning of Section 1(a) of the Copyright Act. *See also* the discussion of "the exclusive right to print and reprint" in 1 NIMMER, COPYRIGHT §102 (1973).

not cover the making of a single copy for an individual requester."[64]

The Petitioner wants this Court to hold that, if a new technology of photocopying is used to perform the function of "printing" as the Congress understood it in 1790 and 1909, it should be no less an invasion of the author's exclusive right because a more modern method is employed. The issue in this case, however, is whether the making of a single copy of a journal article for the use of a scholar or other reader, which was considered permissible before and after the passage of the Act of 1909, should be proscribed if it is accomplished by a technique not available around the turn of the century. In striking a reasonable balance between the rights of copyright proprietors and the rights of users of copyrighted works, there is no reason why the proprietors should insist that they receive all the benefits which arise from new means of making library collections more useful to scholars and other readers. Users of copyrighted materials are equally entitled to share in the progress of science and the useful arts.

We come finally to the contention that, when a library makes a single copy of a journal article at the request of a reader, it is violating an "exclusive right"

[64]Williams & Wilkins v. U.S., 487 F.2d 1345, 1351, C. App. 11. *Compare* American Visuals Corp. v. Holland, 239 F.2d 740 (2d Cir. 1956) cited by Brief for The Authors League of America, Inc. as amicus curiae at 14, where 200 photostatic copies of pencilled artwork were made and disseminated. (The same brief also cites White v. Kimmell, 193 F.2d 744 (9th Cir. 1952); *cert. denied* 343 U.S. 957 (1952) at page 14, but this case dealt with the question whether certain manuscripts were in the public domain and not with the scope of the "exclusive right" created by Section 1(a) of the Copyright Act.

to "publish" the article. The argument is made that "the actual distribution of even one copy, constitutes 'publishing' under Section 1,"[65] but the cases which are cited for this proposition do not support it. Most of the decisions cited do not deal with single copies at all, and, where the effect of the "publication" of "one copy" is discussed, the context is whether an author has lost his common-law copyright by a "general publication" in the course of which he has failed to take the steps necessary to provide the basis for statutory copyright.[66] To the extent that a definition

[65]Brief for The Authors League of America, Inc. as amicus curiae at 14.

[66]Of the three cases cited by The Authors League two are clearly not "single copy" cases. In American Visuals Corp. v. Holland, 239 F.2d 740 (2d Cir. 1956), the Court held that a dissemination of over 200 copies of a work containing a notice of copyright constituted "publication" which satisfied the requirements of 17 U.S.C. §10 so that the plaintiff was entitled to sue for infringement; in Macmillan Co. v. King, 223 Fed. 862, 867-868 (D. Mass. 1914), the distribution of outlines based on Professor Taussig's PRINCIPLES OF ECONOMICS to students in a number of classes was held to be a sufficient "publication" to support an action for infringement. The third case, Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904); *aff'd per curiam* 165 Fed. 426 (2d Cir. 1908); *aff'd* 221 U.S. 603 (1910) held that the exhibition of a painting in a gallery was not a "general publication" by which the painter had surrendered his commonlaw rights.

The Brief for the American Guild of Authors and Composers *et al.*, as amici curiae at 20-21, cites three additional cases. It refers to a dictum in Bobbs-Merrill Co. v. Straus, 147 Fed. 15, 19 (2d Cir. 1906); *aff'd* 210 U.S. 339 (1908) stating that "the common law right is lost by the general publication or unrestricted sale of a single copy." White v. Kimmell, 193 F.2d

of "publication" governs whether common law rights have been lost and whether statutory copyright has been achieved, the relevant provision of the Copyright Act is not included in Section 1(a), and, as the attorney for the Petitioner puts it,

> "One thing is universally agreed upon regarding the definition of ['publish'] or of 'publication' as used in this statute: it means different things in different places in the statute."[67]

Thus, in one of the cases cited by the Authors League, the court clearly differentiated between the right to multiply copies—which is the subject of Section 1(a)—and the possible loss of common law rights by the way in which the author has dealt with a single copy:

> ". . . in case of a book, ordinarily the sole practical benefit to the author is in the right to multiply copies. The exhibition or private circulation of the original or of printed copies is not a publication, unless it amount to a general offer to the public. The unrestricted offer of even a single copy to the public implies the surrender of the common-law right . . . ."[68]

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744 (9th Cir. 1952); *cert. denied* 343 U.S. 957 (1952) dealt with loss of common law copyright by putting as many as 200 copies of a manuscript into unrestricted circulation. The "publication" issue in Continental Casualty Co. v. Beardsley, 253 F.2d 702, 706-707 (2d Cir. 1958); *cert. denied* 358 U.S. 816 (1958) also related to the unrestricted distribution of multiple copies which resulted in the loss of common law copyright.

[67]Pet. Br. 48.

[68]Werckmeister v. American Lithographic Co., 134 Fed. 321, 325 (2d Cir. 1904); *aff'd per curiam* 165 Fed. 426 (2d Cir. 1908); *aff'd* 221 U.S. 603 (1910) relied on in Brief for The Authors League of America, Inc. as amicus curiae at 14.

That it is the *multiplication* of copies which is intended to be protected by statutory copyright has been stated by this Court on a number of occasions. Justice Day, for example, discussed "the nature of the property in copyright" in the following terms in *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 290-291 (1907):

> "A copyright, as the term imports, involves the right of publication and reproduction of works of art or literature. A copyright, as defined by Bouvier's Law Dictionary, Rawles' edition, volume 1, p. 436, is: 'The exclusive privilege secured according to certain legal forms, of printing, or otherwise multiplying, publishing, and vending copies of certain literary or artistic productions.' "[69]

And in *Bong v. Alfred S. Campbell Art Co.*, 214 U.S. 236, 247 (1909), Justice McKenna referred to the author's "right of printing, publishing, copying, etc.", and "this right of multiplication of copies." Where a new work is published, copies are multiplied. No such multiplication occurs when material in a library's collection is made available to an individual reader for the reader's own use by means of a photocopy made by the reader or by the library at the reader's request.

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[69]*See also*, Globe Newspaper Co. v. Walker, 210 U.S. 356, 362 (1908); Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182, 188 (1909).

B. The single-copy practice is a reasonable and customary use of material in a library's collection and is not an infringement of copyright.

No one in this proceeding questions the principle that there are uses of a copyrighted work which will not be held by a court to be an infringement of copyright, this is true notwithstanding the fact that there is nothing in the Copyright Act which expressly provides for such an exception to the author's "exclusive right." The usual way in which this principle is expressed is in terms of the "doctrine of 'fair use'."[70] The Court of Claims found that the use made of the Petitioner's copyrighted materials in the present case was "fair" and therefore was not an infringement.[71] The Petitioner objects to this conclusion but, in doing so, relies upon criteria developed in a special category of "fair use" precedents in which the facts are wholly unlike the present case.

1. A use of copyrighted material which is a "fair use" is not an infringement.

Since the defense of "fair use" does not appear on the face of the Copyright Act of 1909, it is appropriate

[70] *See* 487 F.2d at 1350, C. App. 8.

[71] 487 F.2d at 1362, C. App. 28. *See also* Finding 46, C. App. 103: "The current and recent practices of NIH and NLM as described in the foregoing findings constitute a fair use." The court relied on a number of criteria. *See, in particular*, Part III of the opinion, 487 F.2d at 1352-62, C. App. 11-28.

to begin by underscoring the point that the existence of the doctrine is not at issue (so that we are only concerned with whether the court below applied it properly to the facts in the present case).

To begin with, the Trial Judge recognized that the following would not be held to be infringements of copyright (and suggested that there were "probably many more [examples] which might come to mind on reflection" (App. 46)):

(1) To copy excerpts from literary works for purposes of criticism or review (App. 41);
(2) To copy portions of scholarly works (*Id.*)[72]
(3) for a library to photocopy for a patron a part of a book, or a part of a periodical article, such as a chart, graph, table, or the like (so long as the portion copied is not practically a substitute for the entire original work) (App. 45);
(4) for a library to replace damaged pages of copyrighted works in its collection with photocopies (App. 45-46);
(5) for a library to make a small number of photocopies for in-house administrative purposes, such as cutting up for cataloguing or the like (App. 46); and
(6) for a library to supply attorneys or courts with single photocopies for use in litigation (*Id.*).

[72] *See also* App. 46, where the Trial Judge appears to approve (as "*de minimis*") the making of handwritten copies by scholars and other researchers of copyrighted works for use in research or other scholarly pursuits, provided the "entire" copyrighted work is not copied.

All the members of the court below accepted as valid these illustrations of acts which will not be held to be infringements of copyright, [73] and the majority opinion added the following somewhat different examples:

(7) to make a handwritten or typed copy for personal use;
(8) for individuals to make copies of poems, songs, or other items to be given, perhaps, to lovers and others;
(9) for a court to be given photocopies of recent decisions, with the publishing company's headnotes and arrangement, and sometimes its annotations;
(10) for a judge to make and give to a colleague a photocopy of a law review article, in one of the smaller or less available journals, which bears directly on a problem both judges are considering; and
(11) for one friend to make and send to another a photocopy of a particular item or article.[74]

Counsel for the Petitioner concedes that "the 'individual effort' and 'creative activities' to be encouraged by copyright . . . often require reference to another's material" and that, "in the course of such use, some copying necessarily takes place." (Pet. Br. 19.) He concedes, further, that, while this kind of copying may come within "the literal grant of exclusive rights" under the Copyright Act, it may be exempted from a charge of infringement on the basis of a rule of

[73] The sections of the Trial Judge's opinion in which these illustrations were given were incorporated in Chief Judge Cowen's dissenting opinion. *See* 487 F.2d at 1377 and 1380-81, C. App. 53, 58-59.

[74] 487 F.2d at 1353, C. App. 13.

reason. (Pet. Br. 19-20.) [75] One need only consider the problems posed for the judge who has need of a law review article, the Congressman who needs a copy of a copyrighted article from the Library of Congress or, as here, the doctor in Japan who needs a medical journal article, to understand the reason for the development of a rule of reason which exempts from claim of copyright single-copy photocopying for personal use. The issue here thus can be stated as being whether such a rule of reason was properly applied by the Court of Claims.

2. The Petitioner erroneously seeks to limit the discussion of "fair use" to criteria which do not apply to the present case.

In concluding that the making of single copies of medical journal articles in the present case was a "fair use" of copyrighted material, the Court of Claims began with the premise that "a determination that a use is 'fair,' or 'unfair,' depends on an evaluation of the complex of individual and varying factors bearing upon the particular use. . . ." [76] The Petitioner's discussion of "fair use" however, focuses on only two factors and, within this narrow frame, deals with these factors only in terms of the manner in which courts have applied them in infringement cases where "the use in question

[75] During oral argument before the Court of Claims counsel for Petitioner was asked whether it would violate copyright if a judge asked his law clerk to photocopy a law review article for the judge's use in considering a case before him. At that time, it was the view of Petitioner's counsel that such act would constitute a technical violation of copyright. [Citation unavailable as no transcript of oral argument was made.]

[76] 487 F.2d at 1352, C. App. 11.

has been part of the interweaving of previously published material into another 'writing of an author'. . . ." (Pet. Br. 20.) Nothing of this sort occurred in the present case. No recipient of a photocopy of a journal article is alleged to have interwoven material from the copied article into a published article of his own. [77]

Accordingly, "fair use" precedents which deal with the problems of "plagiarism" or "piracy" have little relevance to the discussion. This is true of *Folsom v. Marsh*, 9 F. Cas. 343 (No. 4901) (C.C.D. Mass. 1841),[78] in which material originally published in a 12-volume compilation of George Washington's writings was included in a later two-volume published work on Washington,[79] of *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962), where a church choir director rearranged a copyrighted choral work and reproduced copies for a high school chorus and a church choir;[80] of *Benny v.*

[77]Petitioner concedes this point: "The present case, of course, does not involve incorporation of materials into a new creation. . . ." (Pet. Br. 22.)

[78]See Pet. Br. 20-22; Brief for Association of American Publishers, Inc. *et al.* as amici curiae at 8; Brief for Associated Councils of the Arts as amicus curiae at 8; and Brief for American Guild of Authors and Composers *et al.* as amici curiae at 14.

[79]*Quaere* also whether Petitioner is correct in suggesting that the issue in Folsom v. Marsh was whether there had been a "fair and bona fide abridgement." (Pet. Br. 21.) *See* 9 F. Cas. at 347: "The defendants' work cannot properly be treated as an abridgement of that of the plaintiffs. . . ."

[80]Pet. Br. 23, 24; Brief for Magazine Publishers Association, Inc. as amicus curiae at 12.

Loew's Inc., 239 F.2d 532 (9th Cir. 1956); *aff'd sub nom. Columbia Broadcasting System, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958); *rehearing denied* 356 U.S. 934 (1958), a television show "parody" case;[81] of *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960); *vacated and remanded with directions per curiam* 369 U.S. 111 (1962); *dismissal aff'd* 268 F. Supp. 444 (D.D.C. 1967) where the issue was whether the publication of a compilation of speeches made by Admiral Rickover was a violation of copyright;[82] and of *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *cert. denied* 385 U.S. 1009 (1967) where defendant used in a published biography of Howard Hughes material taken from an earlier publication.[83]

"Fair use" tests developed in such cases have no application where copying is for the personal use of a scholar or other researcher who does not republish the material. We need not quarrel with Petitioner's suggestion that, if previously published material is "interwoven" into a new published work, it is a "fair use" only where "the material so used has been a reasonable portion of the copyrighted work."[84] That is not *this* case, and labored discussions of why the

[81]*Id.*

[82]Pet. Br. 23-24.

[83]Pet. Br. 24-25; Brief for Magazine Publishers Association, Inc. as amicus curiae at 12.

[84]Pet. Br. 20.

copying of an "entire" article is not the copying of a "reasonable portion" of the article[85] are irrelevant.

Preoccupation with cases involving the borrowing by one author of material published by another has led Petitioner into a discussion of "whether the quoted portions might be used as a substitute for the original work," quoting from *Shapiro, Bernstein & Co. v. P. F. Collier & Son Co.*, 26 U.S.P.Q. 40, 42 (S.D.N.Y. 1934). (Pet. Br. 25.) But, again, the precedent cited is one dealing with the problem of copying in a published work. (In the *Shapiro* case excerpts from a popular song had been used in a serialized story in *Collier's*.) The significance of the phraseology quoted from the court's opinion is distorted when an effort is made to use it as a criterion in the present case. Moreover, the photocopies which NLM and the NIH supplied of articles in back issues of medical journals can be said to be "substitutes" for "the original" only in a very limited sense. "The original" was a bound volume of hundreds of pages. While there are occasions when

[85] *See, e.g.*, Pet. Br. 22-25; Brief for Magazine Publishers Association, Inc. as amicus curiae, Section III.

It should be noted that this "entire work" argument also depends on a doubtful invocation of Section 3 of the Copyright Act, 17 U.S.C. §3 (Act of July 30, 1947, ch. 391, §1, 61 Stat. 652; Act of Oct. 31, 1951, ch. 655, §16(a), 65 Stat. 716). Section 3 provides that, when a copyright is secured on composite works or periodicals, the proprietor acquires the same rights he would have if he went through the mechanics of individually copyrighting individual articles or other component parts. This provision for the administrative convenience of copyright proprietors does not eliminate differences between the nature of periodical volumes, on the one hand, and individual articles on the other and should not foreclose an argument that what is a reasonable use may vary with the nature and length of the protected work.

having temporary access to such a bound volume fulfills a reader's needs, the loan (or sale) of a bound volume (or even an unbound journal issue) will frequently not do at all. As the Court of Claims points out, [86] a bound volume cannot be put into a filing cabinet. It cannot be shuffled with other notes. It cannot be given conveniently to a typist. It cannot be sent conveniently through the mail. Even a reprint, if clipped into a file, is more awkward to work with than a photocopy which has printing on only one side of the page. Thus a photocopy is not a substitute for an original but, particularly for the scholar or other researcher, an indispensable tool in using the original for some of the purposes for which it was intended. A library's function is to make its resources available to users. Providing a photocopy of an original for personal use merely facilitates carrying out the library's function and has no connotation of copyright infringement unless the material is subsequently republished in connection with a substantive exploitation of the work.

The legislative history of a recent amendment to another provision of the Copyright Act specifically recognizes a long-standing exception to copyright protection where copying is for personal use, unaccompanied by subsequent commercial exploitation. In connection with providing copyright protection for sound recordings, the House Judiciary Committee Report states:

> "In approving the creation of a limited copyright in sound recordings it is the intention of the

[86] 487 F.2d at 1353, n. 13, C. App. 13, citing J. Marke *et al.*, *Can Copyright Law Respond to the New Technology?*, 61 LAW LIB. J. 387, 407 (1968) (Remarks of V. Clapp.)

> Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years."[87]

The Committee thus specifically acknowledged the existence of limitations on other copyright proprietors' rights similar to the one which we suggest permits library single-copy photocopying for personal use.

Because of Petitioner's limited focus its brief does not refer to "fair use" considerations which are more directly relevant to the present case. "Implied consent" to a particular use, one such consideration, was one basis for the decision in *American Institute of Architects v. Fenichel*, 41 F. Supp. 146 (S.D.N.Y. 1941). It was there held that the making of six copies of a form published in a booklet dealing with architectural contracts was a "fair use."

The booklet was entitled STANDARD DOCUMENTS OF THE AMERICAN INSTITUTE OF ARCHITECTS. It was copyrighted by the Institute, and notice of copyright was given on the outside cover. The defendant made six copies of one of the forms and

[87]H. R. REP. 487, 92d Cong., 1st Sess. (1971) at 2 U.S. CONG. & ADMIN. NEWS, 1566, 1572 (1971).

delivered them to various persons with whom he was dealing, including contractors. The Institute sued for infringement. The District Judge granted a motion by the defendant for summary judgment, concluding that "The use made by the defendant of the plaintiff's book . . . comes under the head of fair use. . . ."[88] The court amplified its reasoning as follows:

1. When the plaintiff put on the general market a book of forms, "he implied the right to their private use."[89]
2. The words "print," "publish," "copy," and "vend" in Section 1 of the Copyright Act " 'are all clearly intended to be covered by the word "publish" ' " (quoting from Judge Learned Hand's decision in *Fitch v. Young*, 230 Fed. 743, 744 (S.D.N.Y. 1911), *aff'd per curiam*, 239 Fed. 1021 (2d Cir. 1917)), and "Publication means to issue copies to the public." Although "publication of a kind" took place when the defendant delivered the six copies of the form, there was in this act "no derogation of the plaintiff's copyright."[90]
3. Thus "the defendant's use was not the kind of use intended to be forbidden by the statute and does not constitute an infringement."[91]

American Institute of Architects v. Fenichel is a clear holding that there can be no infringement of copyright unless there is "publication" in the sense that copies are "issued to the public." In addition, the making of copies for the private use of the copier (and those he

[88]41 F. Supp. at 147.

[89]*Id.*

[90]*Id.*

[91]*Id.* at 147-48

was dealing with) was held to be a "fair use" because it is in the nature of a book of forms that they are made available to the public for the purpose of practical application. The publication of such a book "implied the right" of a user of the book to make copies of a form as the defendant did and deliver them to others as he did. In the same way, the publication of the scientific articles involved in the present case implied the right of subsequent copying of the articles for the personal use of an individual working in the same scientific field.[92]

3. The Court of Claims applied proper criteria and reached the correct conclusion.

The Court of Claims properly applied the "fair use" principle by considering a "complex of factors, beginning with the fundamental consideration that the primary purpose of copyright protection is "To

[92]For another "fair use" case relying on "implied consent" to a particular use of copyrighted material see Karll v. Curtis Publishing Co., 39 F. Supp. 836 (E.D. Wis. 1941). The chorus of the "fight song" of the Green Bay Packers was used in a magazine article on the Packers. The court held that "when the plaintiff dedicated the song to the Green Bay Packers, by implication at least he consented to a reasonable use thereof associated with the Packers." *Id.* at 837. *See also* Kane v. Pennsylvania Broadcasting Co., 73 F. Supp. 307 (D. Pa. 1947), where the defendant had reprinted individual "first facts" taken from copyrighted books listing such items. In holding this not to be an infringement the court observed that "it would almost seem as though the plaintiff's books were intended to be used in some manner similar to that in which the defendant has used them." *Id.* at 308.

promote the Progress of Science and the useful Arts . . . ."[93] The majority below looked, in particular, at the nature of the material which was copied, quoting from the discussion of "fair use" in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied* 385 U.S. 1009 (1967):

> "Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently the privilege has been applied to works in the fields of science, law, medicine, history and biography."[94]

Against this background the court weighed, on the one hand, the potential harm to the Petitioner from permitting a continuation of single-copy photocopying as practiced by the NLM and the NIH library[95] and, on the other hand, the needs of the users of the material. In this context the court noted, without discussing the "fair use" cases with which the Petitioner is preoccupied, that this is not a situation in which an

[93]487 F.2d at 1352, C. App. 12. *See also id.* at 1362, C. App. 28, quoting Professor Benjamin Kaplan's comment that, in questions of copyright law, it is "fundamental that 'use' is not the same thing as 'infringement,' [and] that use short of infringement is to be encouraged. . . ." KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 57 (1967).

[94]487 F.2d at 1352-53, C. App. 12.

[95]The court took particular account of the "reasonably strict limitations" applied by both libraries. 487 F.2d at 1354-55, C. App. 15-16.

author has published material taken from a copyrighted work:

> "... the medical researchers who have asked these libraries for the photocopies are in this particular case (and ordinarily) scientific researchers and practitioners who need the articles for personal use in their scientific work and have no purpose to reduplicate them for sale or other general distribution .... On both sides–library and requester–scientific progress, untainted by any commercial gain from the reproduction, is the hallmark of the whole enterprise of duplication. There has been no attempt to misappropriate the work of earlier scientific writers for forbidden ends, but rather an effort to gain easier access to the material for study and research. This is important because it is settled that, in general, the law gives copying for scientific purposes a wide scope...."[96]

The court also took account of evidence that, "until quite recently, library photocopying was carried on with apparent general acceptance."[97] Petitioner responds that "Practices of libraries or others before the advent of current photocopying methods are irrelevant." (Pet. Br. 12.) It is difficult to understand why. Even the "fair use" cases selected by the Petitioner make clear that a use which is reasonable and "customary" is a "fair use."[98] The Petitioner's theory seems to be that, if methods for making use of copyrighted works improve, what was once fair ceases to be fair because

[96] 487 F.2d at 1354, C. App. 14-15.

[97] *Id.* at 1356, C. App. 18.

[98] *See e.g.* Shapiro, Bernstein & Co. v. P. F. Collier & Son Co., 26 U.S.P.Q. 40, 42 (S.D.N.Y. 1934).

improvements in technology belong to copyright proprietors and not to users.[99]

In the final analysis, while it considered a number of factors, the court below concluded that the use was "fair" because the importance of the use outweighed any demonstrated harm to the Petitioner:

> "This record simply does not show a serious adverse impact, either on plaintiff or on medical publishers generally, from the photocopying practices of the type of NIH and NLM...."[100]

Because "this record ... fails to show a significant detriment to plaintiff but does demonstrate injury to medical and scientific research if photocopying of this kind is held unlawful,"[101] the court's conclusion should be affirmed.

[99] *See, e.g.*, Pet. Br. 18: "... alternative forms of exploitation in keeping with current technology come within the normal ambit of a copyright owner's rights." *Compare* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908)

[100] 487 F.2d at 1359, C. App. 24.

[101] *Id.* at 1362, C. App. 29.

IV.

FOR ADDITIONAL REASONS NOT RELIED ON BY THE COURT OF CLAIMS THE PETITIONER IS NOT ENTITLED TO PREVAIL

A. The proposal the Petitioner now advances for additional compensation for uses of copyrighted material after payment for the periodical is not authorized by the Copyright Act and would extend copyright beyond its proper bounds.

Petitioner's brief to this Court advances a thesis which, although it may have been implicit in the arguments presented to the court below, was not fully developed. Briefs of several amici elaborate the argument. It runs along this line:

1. "It is virtually impossible to add to the subscribers of [medical] journals."[102]
2. While the number of subscribers "remains static"[103] the costs of publication continually increase.

[102] Pet. Br. 16. *But see* Finding 39(a), C. App. 93-94 to the effect that subscriptions to MEDICINE increased from 2,800 to 5,400 from 1959 to 1969; subscriptions to PHARMACOLOGICAL REVIEWS increased from 2,600 to 3,100 from 1964 to 1969; subscriptions to the JOURNAL OF IMMUNOLOGY increased from 2,600 to 4,700 from 1959 to 1969; and subscriptions to GASTROENTEROLOGY increased from 4,100 to 7,000 from 1959 to 1969.

[103] *Id. See also* Brief for Authors League of America, Inc. as amicus curiae at 8 referring to "static circulations."

3. Petitioner is therefore seeking "payments for use of its articles" over and above the original subscription price of its journals.[104]
4. New technology—in particular, xerography—permits uses of copyrighted materials which were not possible before and, therefore, provides the opportunity for "alternative forms of exploitation" of the original copyright.[105]
5. "[This] lawsuit was brought to achieve some legal recognition of the rights of publishers . . ." to secure additional payments over and above the original subscription price "so that dialogue [between publishers and librarians] would be possible with the objective of reasonable financial accommodation on both sides."[106]
6. The decision of the Court of Claims in this case has reinforced the "adamancy" of librarians in refusing to make the proposed additional payments for the use of materials in their collection.[107]
7. Congress is considering a copyright revision bill and, in that context, "All agree that convenient access to scientific materials should be en-

[104] Pet. Br. 17.

[105] Pet. Br. 18. *See also* Brief for the Authors League of America, Inc. as amicus curiae at 2-3, referring to "the new single-copy medium created by improvements in reproduction technology." *See also* Brief for Associated Councils of the Arts as amicus curiae at 3: "Should libraries be permitted to employ modern technological methods to extend and exhance their tradition function of making works available to the public . . . ?"

[106] Pet. Br. 29. *See also* Brief for American Chemical Society as amicus curiae 16: "The petitioner . . . instituted this action in order to . . . broaden the financial support for the ever-increasing costs of privately published, scientific journals. . . ."

[107] *See* Pet. Br. 29.

couraged,"[108] but no legislation has been enacted.[109]

8. "Reversal [of the decision below] would afford a unique opportunity to produce a workable pilot arrangement–continuation of photocopying with the Court of Claims setting compensation [under 28 U.S.C. §1498(a)] which is reasonable under the circumstances."[110]

The brief for the Petitioner admits that this scenario is incomplete. It is incomplete because, when the present test case[111] was brought, it was expected to produce a rule which would apply to *non-governmental* libraries as well as to governmental libraries. Non-governmental libraries are not subject to suit in the Court of Claims. However, the Petitioner's brief suggests, perhaps with tongue in cheek, that the "guidelines" which would be established by an award of compensation in this case by the Court of Claims "would furnish significant assistance to librarians and publishers to cooperatively achieve their common goal."[112] The Petitioner concludes: "By exercising its

[108] *See* Pet. Br. 27.

[109] "Congress has refused to legislate a reproduction licensing system . . . ." Brief for Authors League of America, Inc. as amicus curiae, 4. *See also* Pet. Br. at 26.

[110] Pet. Br. 29. *See also* Brief for Authors League of America, Inc. as amicus curiae 25: "The establishment of 'voluntary' licensing systems for library reproduction of journal articles . . . is inevitable if this Court reverses the decision below. . . ."

[111] *See* Pet. Br. 29.

[112] *Id.*

function in this case through an award of reasonable compensation, the Court of Claims would furnish an appropriate model for the fashioning of relief by other courts."[113]

When this point is reached, Petitioner and the amici supporting its position offer two somewhat different scripts for a final act. The brief for the Petitioner suggests that "other courts" can use as a model "judicial procedures for setting reasonable license

[113] *Id.* at 30. The relief which might be granted by other courts is discussed in the dissenting opinion of Judge Nichols, 487 F.2d at 1386-89, C. App. 66-71, where it is noted that injunctive relief is authorized by 17 U.S.C. §101(a) and §112, but that "courts can refuse to enjoin copyright infringements if they deem an injunction would be unconscionable." 487 F.2d at 1386, C. App. 67. Judge Nichols does not explain, however, how courts would be expected to deal with the fact that 17 U.S.C. §101(b) provides for minimum statutory damages of $250 even in the absence of actual damage. The Brief of the Petitioner attempts to finesse this problem by totally obscuring it. It is suggested that, if a "balancing of equities" in a suit against a private library "led the court to withhold an injunction, the infringement might be remedied with appropriate monetary relief." (Pet. Br. 30.) The case cited as an illustration–Edgar H. Wood Associates, Inc. v. Skene, 347 Mass. 351, 197 N.E.2d 886 (1964)–involved infringement of *common law* copyright in architectural plans. Since the suit was not based on 17 U.S.C. §101, the statutory minimum of $250 under the Copyright Act of 1909 did not apply. Two other cases are cited: Dun v. Lumbermen's Credit Association, 209 U.S. 20, 24 (1908), and Foster v. American Machine & Foundry Co., 492 F.2d 1317 (2d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3654 (U.S. May 28, 1974). The latter case is conceded to be a patent case and therefore is inapplicable. In *Dun* this Court remanded a copyright case for proof of actual damages, but the case was brought and decided before the 1909 Act established the $250 statutory minimum.

fees . . . under the antitrust laws . . . ," such as "Judicial rate-making for copyright royalties" under the ASCAP consent decree.[114] On the other hand, the Authors League proposes that "government libraries could provide reproduction service to private libraries with respect to articles of any publisher who refused to negotiate mutually acceptable licensing arrangements . . . ."[115]

This case should not, and need not, be used to send lower courts down paths which lead into any such quagmires. The Petitioner and its amici are reacting to fears, not facts, and the record before this Court does not justify and would not support any such judicial legislation.[116]

Petitioner's reasoning is particularly invalid in the assertion that a copyright proprietor has the right to

[114] *See* Pet. Br. 30, n. 16.

[115] Brief for Authors League of America, Inc. as amicus curiae 25. *But compare* Pet. Br. 18, n. 12: "If at all possible, the government should not be involved in controlling the dissemination of scientific information."

[116] The Petitioner wanders far from the record in noting its ultimate nightmare "that a 'single copy' of a journal might some day be stationed in a single location, with images of articles transmitted electronically on demand nationwide." (Pet. Br. 40-41.) Nor do the similarly irrelevant fears expressed by the Petitioner concerning the recently formed Research Libraries Group (the Harvard, Yale, Columbia, New York Public Library consortium) (Pet. Br. 19) take account of the facts that (1) no quality research library could operate without subscribing to recognized basic research sources such as the journals involved in this case, and (2) economies in reducing duplication in certain esoteric and foreign language publications will permit expanded acquisitions in other areas.

derive additional rewards from "uses" of published materials after their original acquisition by a library. A copyright proprietor is not entitled to a fee when a book is loaned, even though this is a use which for some readers may serve as a substitute for the purchase of the book. The reason is that, when an author or a publisher sells a printed copy of the author's work, the use which may be made of that physical embodiment of the author's work is governed by principles which are independent of the author's right to prevent others from appropriating the substance of the writing itself. Once a copyright proprietor has put a copyrightable work in tangible form by making copies of it (by printing or other method), one who purchases or otherwise lawfully acquires such a physical copy is free to use the physical form of the work as he wishes. For example, in the case of the individual owner of a copy in book form, he is free to read it—and re-read it—and let his wife read it or lend it to a friend or sell it.

In the same way, a library is free to deal with a copy of a work in its collection by making it available to an unlimited number of readers for use on or off its premises. It is also free to make copyrighted material available to a reader by making or allowing the reader to make a copy of the material, by hand or by any other method. It has been said that "The most significant distinction between a patent and a copyright is that letters-patent give a monopoly to make, vend and use; while a copyright does not give an exclusive right to use."[117]

[117] BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY §11 at 49 (1944).

When a library makes a reasonable use for the benefit of its readers of works which it has acquired for its collection, and this use does not involve the reprinting, publishing, and sale of new editions of the copyrighted works, no action for infringement should lie. In addition, in the same way in which the rewards to a copyright owner from the exercise of the "exclusive right" to vend are "exhausted" by the first sale, a copyright proprietor which sells a subscription to a medical journal should not be awarded the right to collect royalties or other payments on top of the original subscription price when libraries later make a reasonable and necessary use of the journal in the course of providing normal services to their readers.

B. It was not established that the rights conferred on the Petitioner by the authors of the copied articles included the right to bring this suit.

The Court below assumed, without deciding, that the publisher was the owner of the copyright in the eight articles which had been copied and was entitled to bring the suit for infringement.[118] It is true that the copyright on the issues of the medical journals in which the articles appeared was registered in the name of the publisher, so that any suit for infringement would

[118] 487 F.2d at 1349, C. App. 7 and *Id.* n. 5:

"Defendant vigorously contests the publisher's claim to be the copyright 'proprietor' and its right to sue in this court. The argument is that the individual authors of the articles are the owners and they have not assigned their rights to plaintiff."

normally have to be filed in the name of the publisher,[119] but it does not follow that the publisher had an unrestricted right to bring a suit without the concurrence of the authors of the articles. No such concurrence was secured, and three of the authors testified on behalf of the defendant at the trial.

The Trial Judge solved this problem by relying on "long standing custom:"

> "Ordinarily, there is no written agreement entered into between plaintiff and the authors of submitted manuscripts with respect to ownership of articles stemming from the manuscripts. However, by longstanding custom and absent any written or oral agreement to the contrary, an author who submits a manuscript for publication in a medical or other scientific journal assigns to the owner of the journal (i) the author's proprietary rights in any article stemming from the manuscript, (ii) the right to secure statutory copyright in any such article, and (iii) the right to enforce the copyright under the Federal copyright laws." Finding 10(b), App. 64.

The Court deleted this finding without substituting a finding of its own.[120]

The Trial Judge's finding that it is understood that the publisher will obtain statutory copyright on a medical journal is directly refuted by the fact that, out of twenty-six medical journals published by the petitioner in conjunction with professional societies, the publisher obtains the copyright in its name on only thirteen.

[119] *See* 2 NIMMER, COPYRIGHT §132 (1973).

[120] The dissent of Nichols, J. suggests that he would have retained the finding. 487 F.2d at 1388, C. App. 70-71.

(Finding 5(a), C. App. 73.) Moreover, even in these cases, the publisher may hold the copyright only "for the sake of convenience." (*See, e.g.*, Finding 5(b), C. App. 73-74 and Tr. 40.) The further conclusion that it is custom that "the copyright will be enforced by the copyright registrant"[121] only serves to muddy the waters. The evidence in this case showed quite clearly that it was wholly contrary to established custom, and contrary to the understanding of the authors of the articles which were copied, to treat that copying as copyright infringement and bring suit for compensation. To say that Williams & Wilkins was the proper plaintiff if any suit was to be brought does not determine that any suit should have been brought at all.

The Trial Judge relied on the following generalization:

> "In the absence of evidence to the contrary, the transfer by an author to a magazine publisher of a manuscript without restriction is deemed to carry with it all right, title, and interest, including all rights of copyright, therein."[122]

He cited as the source of this proposition a decision by the United States Court for the Northern District of Illinois,[123] but in fact the quotation came from an article by Professor Henn of Cornell dealing with commercial practices of magazine publishers.[124] In the

[121] App. 33.

[122] App. 33.

[123] Best Medium Publishing Co. v. National Insider, Inc., 259 F. Supp. 433, 434 (N.D. Ill. 1966); *aff'd* 385 F.2d 384 (7th Cir. 1967); *cert. denied* 390 U.S. 955 (1968).

[124] Henn, *"Magazine Rights"–A Division of Indivisible Copyright*, 40 CORNELL L.Q. 411 (1955).

same article, Professor Henn pointed out that while there is indeed a traditional "theory of indivisible copyright,"[125] courts also recognize "equitable interests" in persons other than the holder of the legal title. This makes it possible to market and exploit separately various rights, such as "book rights," "serial rights," and "television rights."[126] Even in such a commercial context, therefore, the author and publisher may have various understandings which limit the rights of the publisher as the copyright proprietor. For example, the magazine publisher may hold the copyright "in trust for the author;"[127] the publisher's interest may be satisfied if his exclusive right to publish is protected during the period of time an issue of his magazine is on sale, or the author may be put in the position to arrange for or permit other uses of his work (by reassignment of rights to the author or by license).

That it is understood in the case of articles published in medical journals that the author's implied "assignment of rights" to the publisher is subject to implied limitations is clear from the findings made in this case.

[125] This theory holds that "with respect to a particular work embodied in concrete form, or separable part of such work, there is, at any one time, in any particular jurisdiction, only a single incorporeal legal title or property known as the copyright, which encompasses all of the authorial rights recognized by the law of the particular jurisdiction with respect thereto." *Id.* at 417-418 (footnotes omitted).

[126] *Id.* at 421.

[127] "Practically all material published in magazines is handled in [this] way, and is later reassigned to the author on request. . ." NICHOLSON, A MANUAL OF COPYRIGHT PRACTICE 58 (1945).

It is the *author* of an article and not the publisher who provides for the distribution of reprints at the time of publication.[128] If a copy of an article is requested from the publisher, the request is referred to the author.[129] If the author's supply of reprints is exhausted, what the publisher offers to sell is *not a copy of the article* but a copy of the issue in which the article appeared. (*Id.*) A third party who wants to republish an article usually requests the permission not only of the publisher but also of the author. (*Id.; see also* Tr. 103, 276, 425-26.)

As the findings of the Court of Claims point out, "all reprints are distributed by authors within several months up to several years after publication" (*Id.*) It is after that point is reached that library photocopying of individual articles takes on a special importance. Such photocopying of out-of-print articles–and not the photocopying of *current* articles–is most directly at issue in the present case.

By custom libraries have made single copies of articles in back issues of periodicals in lieu of loaning the bound volumes and for the greater convenience of readers. One witness for the plaintiff testified that libraries have been making such photocopies for many years (Tr. 104); and another witness testified that the practice "goes all the way back to the beginning of the century, or even before the beginning of the century" (Tr. 837-38). The original authors have applauded the practice–both as authors and as readers–and, until the

[128] A witness for the plaintiff estimated that the average number of reprints ordered by an author is 300 copies, which the author generally gives away. Tr. 88; Finding 11, C. App. 78.

[129] Finding 11, C. App. 78.

present suit was filed, no copyright proprietor objected. This pattern of custom and usage is more directly relevant to the decision in this case and more fully documented on the present record than the custom of the initial assignments of rights by authors to publishers on which the Trial Judge relied. The Petitioner should not have been permitted to use its technical status as the "copyright proprietor" to attack traditional and accepted library practices in direct opposition to the intentions and interests of the authors from whom all rights of copyright are derived.

Three authors of articles involved in this suit testified at the trial.[130] The attitude of such authors is illustrated by Dr. Victor A. McKusick, the author of over 300 papers on genetics (Tr. 663), and the leading author of one of the articles alleged to have been infringed. Dr. McKusick testified that the article "was written to disseminate information concerning the . . . particular area that I have been working in, and the findings and conclusions that I have arrived at as a result of the work [on genetic mucopolysaccharidoses]" (Tr. 664.)[131] He also testified that the

[130] Dr. McKusick, Tr. 661-708 (Count I); Dr. Starr, Tr. 708-18 (Count VI); and Dr. Banks, Tr. 893-923 (Count VII).

[131] *See*, to similar effect, the testimony of Dr. Starr (Tr. 713), coauthor of Exhibit No. 6 (*The Stability of Messenger Ribonucleic Acid in Antibody Synthesis* which appeared in Issue No. 2 (August 1965) of Volume 95 of JOURNAL OF IMMUNOLOGY at 254-61), and the testimony of Dr. Banks (Tr. 901-02), co-author of Exhibit No. 8 (*The Course of Non Specific Ulcerative Colitis: Review of Twenty Years Experience and Late Results*, which appeared in Issue No. 6 (June 1957) of Volume 32 of GASTROENTEROLOGY at 983-1012).

Petitioner had not paid him anything for the article: "It was a voluntary contribution to the journal, quite a different situation than if one is writing a book . . . " (Tr. 671.) On the other hand, the Petitioner was paid a substantial amount–an estimated $800–to include in the published article a colored illustration. (Tr. 668.)

Dr. McKusick testified that he had never had any conversations or writings with the publisher concerning copyright (Tr. 676.) The "Instructions to Authors" published in the issue of MEDICINE in which Dr. McKusick's article appeared made no reference to any "assignment" of copyright to the publisher.[132]

Information published by the Petitioner in the same issue of MEDICINE made clear, on the other hand, its complete disinterest, at the time, in any market for the publication beyond the initial distribution to subscribers. In a notice containing "Information for Subscribers"[133] the Petitioner indicated that it did not attempt to keep a stock of back issues. The notice warned that "Subscriptions should be renewed promptly in order to avoid a break in your series. The publishers cannot guarantee to supply back issues of

[132] *See* Exhibit No. 2, unnumbered page following title page. Except for a reference to securing written permission to cite another researcher's *unpublished* observations, the only mention of authors' rights comes near the end of the "Instructions" and says, "Permission to use illustrative material published previously must be obtained from the copyright holder *and* from the author." (Emphasis supplied.) What better demonstration could there be of the fact that the understandings between publisher and author do *not* transfer all rights and interests to the publisher to do with as he may choose?

[133] *Id.*, third unnumbered page following title page.

belated renewals." New subscriptions were entered to begin with the first issue of the current volume, but it was noted that issues of the current volume may "be out of print at the time the subscription order is received." Nothing anywhere in the issue indicated that a reader could obtain reprints of individual articles. One must conclude that, when, in the present case, a copy was made of Dr. McKusick's article several years after its original publication, the need for such a single copy of a single article in a single issue was one in which the Petitioner, as publisher of MEDICINE had displayed absolutely no interest. The custom of permitting such copying was well established. It limited the nature and extent of the rights conferred on the Petitioner by any "assignment" made by Dr. McKusick when he originally submitted the article for publication, and should have been held to bar the Petitioner from suing for infringement.

CONCLUSION

The purpose of copyright protection is "To promote the Progress of Science and the useful Arts". That purpose is fostered by the dissemination of information and the Court of Claims correctly interpreted the copyright laws in the light of the governing provision of the Constitution.

When a library makes published material in its collection available to an individual reader for the reader's own use by means of a photocopy made by the reader or at the reader's request, it is following a traditional "single-copy" practice which is a reasonable

and customary use of material in the library's collection and not an infringement of copyright. The statutory history of the word "copy" in §1(a) of the Copyright Act makes clear that the term was not intended to apply to making a single copy of material from a book or periodical for personal use. Moreover, the remedy for infringement of copyright does not apply where, as here, the user is making "fair use" of copyrighted material.

New technology now makes such copying more efficient, but there is no reason why the benefits to be derived from that technology should be withheld from libraries and the users of their collections in an effort to create an additional source of income for publishers of professional journals. Although the Petitioner in this case professes not to want to interfere with the dissemination of knowledge, the precedent which would be established by a reversal of the decision of the Court of Claims would have precisely that effect. It would threaten to terminate one of the most basic functions performed by libraries. In the interest of scholarship and research such a threat should not be allowed to come about.

The result reached by the Court of Claims was correct. Its decision should be affirmed.

Respectfully submitted,

PHILIP B. BROWN
STEPHEN C. LIEBERMAN
Attorneys for Amici Curiae

Of Counsel:
JOHN P. FURMAN